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SUBJECT: VENEZUELA'S CONSTITUTIONAL REFORM: A STEP TOWARDS
TRIPS-MINUS

REF: A. CARACAS 2050

[1B](#). 2006 CARACAS 2736

[1C](#). CARACAS 366

Classified By: Economic Counselor Andrew N. Bowen for reasons 1.4 (d)

[11](#). (C) Summary: The BRV's proposed constitutional reform removes unambiguous constitutional protections from intellectual property rights (IPR). The removal of these protections give the BRV more constitutional flexibility to walk away from its IPR obligations or pass anti-IPR laws that would violate signed treaties. Anti-IPR statements from the official who drafted the reforms suggest that any new IPR decrees could put Venezuela in apparent violation of its international obligations. End Summary.

Redefining Intellectual Property Protection

[12](#). (SBU) Article 98 of the 1999 constitution guarantees state protection for intellectual property rights "in accordance with the conditions and exceptions established by law and the international treaties executed and ratified by the Republic in this field." (Note: The constitutional referendum vote is scheduled for December 2. End Note.) The proposed change to article 98 weakens this protection and states, "Cultural creation is free. This liberty is understood as the right of cultural diversity in the invention, and production of creative, scientific, technological, and humanistic works, including legal protection of the rights of the author over his work. The State recognizes the rights of all to freely take part in the cultural life of the community, enjoy the arts and to participate and enjoy the benefits of scientific and technological progress" (Reftel A). In the amended article 98, the BRV notably deletes any mention of abiding by established IPR law and international treaties, thus potentially removing constitutional protection for TRIPS, Paris, and Bern conventions. The draft article only refers to copyrights and removes any mention of intellectual property rights.

IPR's Legal Limbo

[13](#). (SBU) Despite the removal of constitutional protection for

IPR, many local analysts initially believed that the proposed changes do not explicitly do away with IPR protections contained in local law, international treaties, and integration agreements. However, the level of concern and legal uncertainty has increased after analyzing the changes to article 98 in conjunction with the changes to article 153.

Article 153 in the 1999 Constitution says, "Provisions adapted within the framework of integration agreements shall be regarded as an integral part of the legal order in force, and shall be applicable directly and with priority over internal legislation." The National Assembly completely removed this sentence from article 153, leaving in limbo the supranational Andean Community (CAN) decisions which had heretofore automatically become part of Venezuela's legal framework. CAN decision 486 (the Common Intellectual Property Right Regime) and decision 351 (the Cartagena Agreement on Copyright) amongst others have provided the bulk of IPR protection in Venezuela (Reftel B). (Note: Venezuela left the CAN in April 2006, but has continued to apply previous CAN norms in the absence of any other regulations. End Note.)

Plausible IPR Scenarios

14. (SBU) The consensus among Venezuelan IPR lawyers has been that the changes to article 98 and 153 are vague, open to interpretation, and would have different ramifications depending on how the Venezuelan Supreme Court (TSJ) interprets them. Technically international agreements like the CAN, TRIPS, and the Paris and Bern Conventions signed by Venezuela should remain in force even without constitutional protection. Many pro-reform Chavistas when talking to the opposition press claimed Venezuela would still rank international law and treaties over local law even without

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the constitutional guarantees. However, given the noticeable lack of judicial independence in Venezuelan courts, and the strategic deletions of constitutional protection for treaties, it seems unlikely that the BRV plans on following international practice.

15. (C) A more pessimistic scenario is that the BRV would use the deletions in 98 and 153 as a pretense to retroactively void automatically incorporated international agreements. Another view holds that the TSJ would require the National Assembly to approve all treaties and integration agreements not initially passed by them, allowing the National Assembly the flexibility to selectively choose which agreements it wants to implement. Many local lawyers including Ricardo Antequera (strictly protect), co-author of Andean Decision 351, advisor to the World Intellectual Property Organization (WIPO), and a law professor at five different Venezuelan universities, believes that if the reforms were to pass, no one would know what IPR law to follow the next day.

----- Other Constitution Reform Articles Indirectly Attack IPR -----

16. (C) Besides the challenges to intellectual property in articles 98 and 153, many lawyers have argued that Chavez' changes to articles 113 and 115 also weaken IPR protection. Chavez' proposed reform to article 113 prohibits "monopolies" and "accords, practices, conducts and omissions by private parties that injure the methods and systems of the social and collective production, which ensure a just and equitable distribution of goods and services." During an October 2 interview on government controlled Venezuelan Television (V-TV), Eduardo Saman, author of the amended article 98, former director of the Autonomous Service for Intellectual Property (SAPI), and current director general of the BRV's metrology agency (SENCAMR), said that trademarks and patents that impede the fabrication of generic medicines and the

reproduction of technology were monopolies. As a result, many lawyers believed Saman would use 113 to argue for the elimination of IPR protection for brands, trademarks, and patents.

¶7. (SBU) Many local lawyers also believe that the BRV would use the amended article 113 to protect BRV sponsored cooperatives that earn income from pirating CDs. The co-sponsors of Saman's reform to article 98 were in fact three cooperatives that sell pirated music and DVDs. Antequera also argued that Chavez' proposed reform to article 115 (Reftel A) changed the definition of private property to only include tangible property, which was implicitly meant to exclude intellectual property. The consensus among local lawyers is that the changes to article 113 and 115 could give more constitutional support and justification to any TSJ rulings limiting the scope of IPR and protections.

Anti-IPR Ideologues Controlling Policy

¶8. (C) During a November 26 meeting, Magdaly Sanchez (strictly protect), an IPR lawyer at Hoet, Pelaez, Castillo, and Duque, told Econoff that Saman, a longtime friend, told her that the two new IPR decree laws on industrial property and copyright were ready for Chavez' approval. Sanchez also noted that Saman was a very influential figure within the BRV, explaining he was the only one who personally presented his reform project (amended article 98) directly to the National Assembly. Saman, who has constantly changed his analysis of article 98 depending on the intended audience, said during a television appearance on the government controlled V-TV, "The right of the author is cultural and not a form of property, therefore, we are removing constitutional protection from patents and trademarks. These are instruments of businesses and not cultural rights." Saman also has said he was trying to decriminalize the pirating of all works, and wanted to encourage informal CD vendors to sell more pirated Venezuelan CDs and movies to influence the "cultural education" of the people. Despite the changes to article 153 and other contradictory statements, in an interview published by the daily, "El Universal," Saman said, "Venezuela will continue to protect IPR through local law and the international framework observed by Venezuela." Under

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Saman's leadership and influence with SAPI, the BRV has not issued any pharmaceutical patents since 2004. The country also remains on the Special 301 Priority Watch list (Reftel C).

Comment:

¶9. (C) Chavez has promised 100 - 120 decree laws following the approval of the constitutional reform and one of these decrees will most likely touch on intellectual property. The strategic deletions to article 98 and 153 and anti-IPR public statements from influential BRV officials indicate that Venezuela is moving quickly towards having a TRIPS-minus IPR regime.

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